a

THE BOARD OF TRUSTEES OF THE SABAH FOUNDATION & ORS.

v.

DATUK SYED KECHIK SYED MOHAMED & ANOR.

b

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
IAN HC CHIN J
[CIVIL SUIT NO: 351 OF 1979]
9 APRIL 1997

c ***CIVIL PROCEDURE:*** *Action - Dismissal of action - Disposal of action without trial - Striking out - Want of prosecution - Striking out for want of prosecution at the instance of the defendant - Time - Delay for nine years in not proceeding in cause of action - Rules of the High Court 1980, O. 18 r. 19*

d ***CIVIL PROCEDURE:*** *Injunction - Mareva Injunction - Solicitor - Duty of - Pleadings - Striking Out - Striking out claims and action - Summons for directions - Delay in fixing date for hearing of summons for direction*

e On 22 February 1979 two writs, Civil Suit No. 351 of 1979 ('Zara Suit') and Civil Suit No. 352 of 1979 ('Banita Suit') were taken out respectively by the plaintiffs against the defendants. From 1979 to 1981 the parties' solicitors had taken various proceedings concerning the pleadings leading to the filing of the summons for directions ('summons') on 8 August 1981. The summons was heard on 26 October 1981 but adjourned generally with no return date.

f On 23 December 1981 the plaintiffs' solicitors requested the High Court Registry to refix the summons for hearing but this met with no success not even after subsequent numerous written requests, *viz* one in 1982, another one in 1983, three in 1984, nine in 1985 and three in 1986, the last being on 26 April 1986. These seventeen letters requesting for the summons to be refixed for hearing did not manage even a single acknowledgment from the High Court Registry. Thereafter, the plaintiff's solicitors did nothing from 26 April 1986 to 21 June 1995, a period of more than nine years.

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The Sessions Court, to which the dockets of the two suits had ended up, then wrote to the plaintiffs' solicitors to inform them that the cases would be mentioned in the Sessions Court on 25 July 1995. Plaintiffs' solicitors replied on 10 October 1995 requesting the case to be sent back to the High Court and this was done on 25 October 1995.

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The plaintiffs' solicitors did nothing for another two months until 8 January 1996 when they wrote to the High Court Registry to fix an early trial of the suit when the summons had not yet been dealt with. This was followed by another eight similar letters, the last one being on 2 September 1996 requesting a hearing date for the trial of the suit. On 30 September 1996 the plaintiffs' solicitors received a Notice of Hearing from the High Court stating that the trial date for the Banita Suit was to be on 27 January 1997.

On 15 October 1996 the plaintiffs' solicitors requested for a hearing date for the summons for the Zara Suit and this was followed by another reminder on 15 November 1996. Again, all these letters met with no response. Another month of inaction followed.

On 7 January 1997 the High Court on its own motion issued a notice to the solicitors of all the parties requiring them to attend Court to decide on why the Zara Suit should not be heard together with the Banita Suit. On 15 January 1997, the Court order the two suits to be tried together and also gave directions relating to the Zara Suit. The date of the trial was moved to 3 March 1997.

On 21 February 1997 and after the Court had fixed the two suits for trial, the defendants took out two separate applications to have the suit struck out under O. 18 r. 19 of the Rules of the High Court 1980 or under the inherent jurisdiction of the High Court.

The issue before the Court was whether there was inordinate and inexcusable delay by the plaintiffs that warranted their cases to be struck out.

Held:

[1] The Court disagreed with the case of *Chern Yen Ming & Anor. v. Teng Ik Ngee Constructions Sdn. Bhd. & 3 Ors.* which held that it is the duty of plaintiffs' solicitor to pursue their matter with the relevant Court officer. Instead the Court held that it was unable to find any rules in the Rules of the High Court 1980 ('the RHC') as imposing a duty on the plaintiffs' solicitors in ensuring that the Court officer do their job. The rules in fact imposed many duties upon the Court officers, which rules if observed by the Court officers would ensure the proper administering of justice. One of those duties is to maintain various books and registers. Another duty is in respect of the sealing and dating (with the date it was filed) of documents filed with the Court. Hence, it was all up to the Court officers to do what was needed after the documents had been filed. No one should be visited with the fault or inefficiency of the Court registry.

[2] On the issue whether the plaintiffs' solicitors should have seen the Deputy Registrar or the Senior Judge when their letters met with no response instead of sitting back and doing nothing for about 9 years, the Court held that the RHC do not impose such a duty on the plaintiffs' solicitors. If the Court registry had worked as it was supposed to, there would be no problem of re-fixing the summons for hearing. The fact remained that it was through no fault of the plaintiffs or their solicitors that the summons was not re-fixed for hearing but entirely that of the Court registry. Though the suggested measures might bring about result, the failure to take them did not mean that the plaintiffs or their solicitors had been at fault because the conduct of the matter was governed by the RHC and there was no infringement of the same and therefore there had been no default. The onus was on the Court registry to put its house into order and to fix every single matter filed and awaiting to be dealt with for hearing without having to be reminded. It would be a travesty to blame someone for the fault of the Court registry.

[3] On the issue whether the plaintiffs and their solicitors general disinterest in the case could be a ground for striking out their action in that for the period of more than nine years plaintiffs and their solicitors did not send any reminders nor do anything to get the summons re-fixed for hearing, the Court referred to the Court of Appeal case of *Hongkong Bank (M) Bhd. v. Raja Letchumi* and the Federal Court case of *Public Finance v. Natcom Development Sdn. Bhd.* These cases were decided after the Federal Court decision of *Vasudevan v. T. Damodran.* The Court held that in so far as the English law was concerned, there was no such general ground for striking out as "general disinterest" irrespective of prejudice. As for the Malaysian Law, the law would be the same as in England ever since the *Vasudevan's* case which meant that there was no such ground as "general disinterest" irrespective of prejudice. Such "general disinterest" must be blameworthy within the test laid down by *Vasudevan's* case.

[4] If the law was to be changed, it would be done by the Federal Court. The Court of Appeal case of *Hongkong Bank* could not and should not be read as changing the law as hitherto been laid down by the *Vasudevan's* case. As for the *Public Finance* case, the Court held that the Federal Court case did not lay down a new general ground of "general disinterest" for striking out. In fact the Federal Court was merely summarizing the law as it then stood but that summary was incorrect because the law hitherto contained no provision for striking out on the ground of "general disinterest". If the Federal Court had intended that there was to be a new test of "general disinterest", it should have said so expressly but it did not.

[5] On the facts, the Court held that the plaintiffs or their solicitors were not to be blamed because they have done all that was required by the RHC and it was entirely the fault of the Court Registry in not re-fixing the summons for hearing.

[7] The Court also held that the application for striking out an action can be made at any time even after the case had been set down for trial.

[Both applications dismissed with costs to the plaintiffs.]

Cases referred to:
Lawrence v. Hodgson 1 Y & J 368 ***(refd)***
Muhammad v. Muhammad (Sharif Pakistan Legal Decisions) 1966 Azad J & K 5 ***(refd)***
Chern Yen Ming & Anor v. Teng Ik Ngee Construction Sdn. Bhd. & 3 Ors [1996] 1 CLJ 571 ***(not foll)***
Boota Singh v. Ismail bin Hj. Ali [1957] 23 MLJ 127 ***(refd)***
Jumatsah bin Daud & Anor v. Voon Kin Kuet & Anor [1981] 1 MLJ 254 ***(refd)***
Athur Lee Meng Kwang v. Faber Merlin Malaysia Bhd. & Ors. [1986] 2 MLJ 194 SC ***(refd)***
Vasudevan v. T Damodran [1981] 2 MLJ 150 FC ***(refd)***
Hongkong Bank (M) Bhd. v. Raja Letchumi [1996] 2 MLJ CA ***(not foll)***
Public Finance Bhd. v. Natcom Development Sdn. Bhd. [1996] 2 MLJ 657 FC ***(refd)***
Kincardine Fisheries Ltd. v. Sunderland Marine Mutual Insurance Co. Ltd. (Unreported, 21 Jan 1997, UK, HC) ***(refd)***
Eastern Century Sdn. Bhd. v. Hj Askil bin Manung Anor. (2 Nov. 1996, HC, Kota Kinabalu) ***(refd)***
Sparrow v. Sovereign Chicken Ltd. (Unreported 8 June 1994, CA) ***(refd)***
Roebuck v. Mungovin [1994] 2 AC 185 ***(refd)***
Negara Properties Sdn. Bhd. v. Akitek Bersekutu Malaysia [1995] 2 MLJ 185 ***(refd)***
Bank Bumiputra Malaysia v. Lorrain Esme Osman [1987] 1 CLJ 572 ***(not foll)***
Jamir Hassan v. Kang Min [1992] 2 MLJ 46 ***(not foll)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19, O. 34 r. 8(2), O. 56 r. 1, O. 60 rr. 3(1)

Other source referred to:
White Book, para. 18/19/4

For the plaintiffs - Nicholas Warren, Q.C.; M/s. Jayasuriya & Kah
For the defendants - John Cherryman, Q.C.; M/s. Chau & Thien
For the Government of the State of Sabah - Juprin Wong Adamal

JUDGMENT

Ian HC Chin J:

Introduction

On 22 February 1979 two writs, Civil Suit No. 351 of 1979 and Civil Suit No. 352 of 1979, were taken out and I shall refer to them, the earlier as the Zara Suit and the other the Banita Suit. The Zara Suit was taken out by the Board of Trustees of the Sabah Foundation, Sinsuran Sdn. Bhd. and Seranum Sdn. Bhd. against Datuk Syed Kechik bin Syed Mohamed and Zara Sdn. Bhd. The claim in Zara Suit can be very briefly stated to be, as against Datuk Syed bin Kechik Syed Mohamed, for an account of profits and for an order of payment for losses and as against Zara Sdn. Bhd., an account of profits by a constructive trustee. As for the Banita Suit, it is a claim by the Board of Trustee of the Sabah Foundation and Seranum Sdn. Bhd. against Datuk Syed Kechik bin Syed Mohamed and Syarikat Banita Sdn. Bhd. for an account of profits in respect of certain timber concession. Seventeen years later, that is on 21 February 1997, the defendants in two suits took out separate applications to have the suits struck out under O. 18 r. 19 of the Rules of the High Court or under the inherent jurisdiction of the High Court, after the Court had fixed the two suits for trial. Arguments were heard on 27, 29 and 31 March. It was contended that there was inordinate and inexcusable delay.

Whether There was Inordinate and Inexcusable Delay

As for the Zara suit, I do not propose to go through each and every year that had elapsed since the filing of the writ. There is basically no serious complaint directed at the inaction during the years from 1979 to 1981 when the parties' solicitors had taken various proceedings concerning the pleadings leading to the filing of the summons for directions ('summons') on 8 August 1981 which summons was heard on 26 October but adjourned generally with no return date. The plaintiffs' solicitors on 23 December requested the High Court Registry to refix the summons for hearing but this met with no success not even after subsequent numerous written requests, *viz.*, one in 1982, another one in 1983, three in 1984, nine in 1985 and three in 1986, the last being on 26 April 1986. These 17 letters requesting for the summons to be refixed for hearing did not manage even a single acknowledgment from the High Court Registry. As if induced or infected by the inaction of the High Court Registry, the plaintiffs' solicitors also undergone a period of inaction because they did nothing from 26 April 1986 to 21 June 1995, a period of more than nine years for which initially no explanation was offered for such inaction but by a subsequent affidavit (which came as a result of the submission that the

solicitor should have seen the Deputy Registrar of the High Court concerning the unanswered letters) the solicitor said:

> 7. As to the suggestion in para. 5.6(a), over the years on a few occasions when I was in Court, I had seen the then Deputy Registrar regarding the Zara and Banita cases. I do not have any records of these meetings. However from my experience, it was the practise to see the Assistant Registrar on such matters.
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> 8. As to para. 5.6(b), it was not and still is not a practise in the profession for the Counsel to see Judges regarding their cases unless there were exceptional circumstances as explained in paras. 18-21 of my affidavit dated 7 March 1997.

As for the attendances before the Deputy Registrar which the solicitor deposed to, it was criticised by Mr. John Cherryman QC, learned Counsel for the defendants, as being lacking in detail, such as when and what was discussed, as to be of any value. That submission I agree because that averment is such a gloss over the details that it serves no purpose and if it was intended to explain the more than nine years of inaction, it failed miserably. As for the "exceptional circumstances" which the solicitor talked of his affidavit, *supra*, it was elaborated in his earlier affidavit of 7 March in this way:

> 18. I was in Court together with my then pupil, Mr. Junior Koh for Suit No. K280 of 1990 on 20 June 1996 for a hearing in Chambers before His Lordship [Justice Ian Chin]. After the hearing, the Court gave to Counsel a list of cases fixed for trial before His Lordship. His Lordship observed that trial dates for cases filed in the 1990s were already given by his Court. His Lordship expressed his concern that there may be earlier cases set down for trial but not fixed for hearing yet. Counsel were encouraged to let the Court know of such cases.
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> 19. I was in Court together with my then pupil, Mr. Junior Koh for Suit No. T26 of 1991 on 23 July 1996 for a hearing in Chambers before His Lordship. The case was for a trial which was adjourned in Chambers for the purpose of a settlement out of Court between the parties. After the hearing, His Lordship made the same observations set out in para. 18 hereof.
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> 20. I attended Court together with my then pupil, Mr. Junior Koh for Suit No. K1201 of 1985 on 14 August 1996 for a hearing in chambers before His Lordship. Counsel for the plaintiffs was Mr. Ho Kin Kong of M/s. Ho Chong Yong Vanugopal. After hearing, I gave a written note to His Lordship. The written note contained the suit numbers and names of the parties for the Zara and Banita case. I had also indicated to His Lordship the status of the Zara and Banita case.

21. On 30 September 1996, my firm received a Notice of Hearing from the High Court stating that the trial date for Suit No. 352 of 1979 was to be on 27 January 1997. A copy of the said Notice of Hearing dated 28 September 1996 is now produced and shown to me marked "AD-6".

The events prior to the "exceptional circumstances" were these. The plaintiffs' solicitors were earlier roused to action when the Sessions Court, to which the dockets of the two suits had ended up, wrote to them to inform them that the case will be mentioned in the Sessions Court on 25 July 1995 and they replied on 10 October requesting the case to be sent back to the High Court; this was done when the Sessions Court on 25 October informed the plaintiffs' solicitors that the case docket had been sent back to the High Court. The plaintiffs' solicitors did nothing for another two months until 8 January 1996 when they wrote to the High Court Registry to fix an early trial of the suit when the summons had not yet been dealt with and this was followed by another eight similar letters, the last one being on 2 September, requesting a hearing date for the trial of the suit. It was only on 15 October that the plaintiffs' solicitors reverted to requesting a hearing date for the summons and this was followed by another reminder on 15 November.

Again, all these letters met with no response. Another month of inaction followed. On 6 January 1997 the plaintiffs obtained an *ex parte* mareva injuction. The High Court then on 7 January on its own motion issued a notice to the solicitors of all the parties of the two suits requiring them to attend before me on 9 January as to why the Zara suit should not be heard together with the Banita suit which had been fixed for trial commencing 27 January. It was 9 January also that the Court was supposed to hear all matters relating to the grant of the injuction. On that day the issue of joint trial was adjourned to 15 January for argument while the matter of the injuction was adjourned to 21 February. On 15 January, I ordered the two suits to be tried together and I also gave directions relating to the Zara suit. The date of trial was moved to 3 March 1997. On 30 January, the defendants' solicitors put the plaintiffs' solicitors on notice that they will be applying to strike out both the suits.

It was against this backdrop that Mr. Nicholas Warren, Q.C., learned Counsel for the plaintiffs, argued that there was no delay on the part of the plaintiffs or their solicitors because, which I summarised briefly to be, the summons had been taken out as required by the rules and that it was all up to the Court to have the summons refixed for hearing after it had been filed and which the Court did not do. Learned Counsel then quoted the maxim *actus curiae neminem gravabit* ('an act of the Court shall prejudice no-one') and referred to *Lawrence v. Hodgson* 1 Y & J 368, at p. 372 and *Muhammad v.*

Muhammad Sharif Pakistan Legal Decisions 1996 Azad J & K 5, 9 where it is said: "There is ample authority for holding that litigants should not be allowed to suffer on account of a mistake of the Court and we hold accordingly." On the other hand, Mr. John Cherryman, Q.C., contended that it is not sufficient for the plaintiffs to write those letters, which was submitted to be perfunctory, and then sit back for well over 17 years when the Court was not moved by those letters but that the plaintiffs or their solicitors should have pursued the matter further by (a) raising the point specially with the Deputy Registrar at an appointment arranged with Deputy Registrar and, if that failed, (b) writing to and or making personal request to a Judge or the Senior Judge of the High Court in Kota Kinabalu. Since, learned Counsel continued, they did none of that they cannot be heard to say that their own delay should be excused due to the fault of the Court and learned Counsel then referred to *Chern Yen Ming & Anor v. Teng Ik Ngee Construction Sdn. Bhd. & 3 Ors* [1996] 1 CLJ 571 as supporting that proposition. *Chern Yen Ming* case deals with O. 56 r. 1 of the RHC which provides for appeal against a decision of a Registrar to a Judge in Chambers by serving a notice (Form 114) on every party to attend on a day specified in the notice and sub-r. (3) says the notice "must be issued within 5 days after the decision appealed against" and served not less than 2 clear days before the day fixed for the hearing of the appeal. The appellant in that case filed the Form 114 within the time allowed for appeal but the Court only signed and sealed Form 114 some 10 months later. The learned Judge in that case, relying on *Boota Singh v. Ismail bin Hj. Ali* [1957] 23 MLJ 127, held that the word "issue" must mean the date the Court actually signed sealed and dated Form 114. The learned Judge in that case also said (at p. 574-575):

> The primary responsibility rests with the solicitors for the 3rd and 4th defendants to ensure that the Court issued the notice in Form 114 within 5 days after the decision appealed against. It is an exercise in futility to put the blame to the Court in issuing the notice on 10 October 1993. The Court is totally blameless. It is the legal duty of the solicitors for the 3rd and 4th defendants to observe the strict provisions of O. 56, 5.1(3) of the RHC. If need be, it is the duty of that solicitors to pursue the matter of issuing the notice within time with the relevant Court officer and this must surely be the best way to comply with the stringent requirements of O. 56, 5.1(3) of the RHC

That case which speaks of a duty "pursue the matter ... with the relevant Court officer", a proposition also made by Mr. Cherryman, Q.C., calls for an examination of the Rules of the High Court 1980 ('RHC') to see if such a duty, which duty necessarily means ensuring that the Court officers do their job, had been imposed. In this regard, I am unable to find any rule as imposing such a duty. The rules in fact imposed many duties upon the Court officers, such as those found in O. 60, which rules if observed by the Court officers

would ensure the proper administering of justice. One of those duties is to maintain various books and registers, like the Cause Book, the Summons in Chambers Book and the Register of Appeals from the Subordinate Courts. From those books, the Court officers keep track of the record of each matter. Another duty is in O. 60 r. 3, which is sealing and dating (with the date it was filed) documents filed with the Court. Take the case of a Summons in Chambers or Form 114 where the date of hearing by the Judge must be inserted before the Summons in Chambers can be returned for service. The date of hearing is not inserted without the Judge being consulted with the result that the documents must be left behind with the Court registry until such time after the Judge had been consulted and the date of hearing had been obtained. That should not cause problem (other than that of lost files and documents) if the documents are signed, sealed and dated the day they were received and which they should be on the authority of *Jumatsah bin Daud & Anor v. Voon Kin Kuet & Anor* [1980] 1 MLJ 254, at 255-256, Chong Siew Fai J (as he then was) where it is said:

> However, *Boota Singh's* case, in my view, is distinguishable. In that case, no question arose respecting the time of presenting the summons to the Court for sealing and the effect thereof. Indeed, from the report of the case, it is not known when the summons was presented for sealing. The point there in issues was whether the Limitation Ordinance ceased to run when the plaintiff requested the Court clerk to prepare the summons or whether it continued to run until the summons was actually sealed and issued. In the instant case the plaintiffs had filed the writ and paid the fee therefor within the period of limitation but from the date appearing on the writ it seemed that the Court official had signed and sealed the writ after the expiration thereof.
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> Counsel for the plaintiff contended that since the writ had been filed and payment therefor made on 2 November 1977, (these are not challenged), which was before the expiration of the period of limitation, what the registry officials did with the writ of summons thereafter was beyond the plaintiffs' control and the suit must be taken to have been instituted within time.
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> Since all acts relating to the issue of the writ of summons herein were done before 31 May 1980, only the Rules of the Supreme Court 1957 need be considered.
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> Order 2 r. 8 of the 1957 Rules provides: "Every writ of summons ... shall bear date **on the day on which the same shall be issued** ..." (The emphasis is mine); and
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> Order 5 r. 11 thereof provides: "Every suit of summons shall be sealed with the seal or stamp of the Court and shall be dated and signed by the Registrar."

In *Clark v. Bradlaugh*[2] it was held that the issue of a writ of summons in an action was not a judicial act but the act of the plaintiff. Now what has a plaintiff to do in the High Court Registry in Kuching when he wants to issue a writ of summons? He or his advocate will properly prepare and sign the required copies of the writ and praecipe, and submit them to the proper officer in the Court's registry for dating, signing and sealing after paying the prescribed fee. Once these are done the plaintiff has completed his part in the issue of a writ. What is required thereafter is some act of the Court official e.g. the affixing of the seal of the Court and so on, to give the writ its validity. (Order 5 rr. 11, 12 and 13). Having regard to the provisions in O. 2 r. 8, the writ should, to my mind, be dated on the day the writ is filed and the filing fee is paid, and with the same date of the filing and the payment. This is in line with such cases as *Pritam Kaur v. S. Russell & Sons Ltd*[5] where the expiry date of the limitation period of a suit fell on a public holiday, the plaintiff issued the writ on the following day and the writ was dated with the date of that following day. Indeed, as Denning L.J. said in Pritam Kaur on p. 619:

> As soon as the offices of the Court re-opened on Monday, 7 September 1970, the plaintiff issued the writ. That is to day, her solicitors took the writ to the offices of the district registry at Leicester. A clerk in the registry stamped it with the official stamp in the proper place (*locaus sigillare*). It was than duly issued.

The present dispute arose because of the irregular practice of the Court registry in Kuching. Until a few months ago, it did happen that writs of summons presented to the registry were dated a few days after their being filed. However the practice has ceased and all writs filed are now dated with the same dates on which they are filed and filing fees paid. The state of affair in the instant case was the result of the previous erroneous procedure. It is clearly unjust and prejudicial to the plaintiffs who, unless remedial measure is available and taken, will be made to suffer owing to no fault of their own or their advocates. Can anything be done about it? In *Kirk v. Dorby*[4] the writ of summons was mistakenly dated and it was held that the Court had power to order amendment of the date thereon to correspond with that appearing on the praecipe which was correctly dated. The question of statutory limitation did not arise in *Kirk v. Dolby*, whereas, in the instant case, limitation of action is in issue, there is therefore all the more reason that amendment should be allowed.

and also on the authority of O. 60 r. 3(1) of the RHC which says: "Any document filed in the Registry in any proceedings must be sealed with a seal showing the date on which the document was filed and any document not required by these rules to be sealed must show the date on which it was filed." Therefore, be it a writ, summons in chambers or Form 114, it must, in my view, be signed and dated the date it was filed. More to the point, it is the responsibility of the Court officers that it should be done and, thus, I am, respectfully, unable to agree with *Chern Yen Ming & Anor. v. Teng Ik Ngee*

Construction Sdn. Bhd. & 3 Ors. which did not advert to *Jumatsah bin Daud & Anor. v. Voon Kin Kuet & Anor*. which concluded that it was all up to the Court officers to do what is needed after the documents had been filed. Another relevant case not referred to is *Athur Lee Meng Kwang v. Faber Merlin Malaysia Bhd. & Ors.* [1986] 2 MLJ 194 SC 195, where the following passage appears:

> ... Mr. Humfrey Ball argues that the meaning of the words "entered for hearing" appearing in O. 52 r. 3(2) is the date on which the Registrar fixed the date of hearing, i.e. 9 November 1985... We do not agree. In our judgment, having regard to the practice of our Court, the words "entered for hearing" in that sub-rule, also mean the filing of the notice of motion. In the circumstances, the leave has not lapsed since the motion was filed on 16 July 1985, i.e. within 14 days after the leave was granted...

and upon which passage I would have relied on to say that the Form 114 would be regarded as having been issued on the day it was filed. I am also unable to agree because no one should be visited with the fault or inefficiency of the Court registry (*Muhammad v. Muhammad Sharif*).

This brings me to the question of whether the plaintiffs' solicitors should have seen the Deputy Registrar or the Senior Judge when their letters met with no response and instead of sitting back and doing nothing for about 9 years and instead of writing those perfunctory letters. The RHC do not impose such duty. On the one hand if the Court registry works as it is supposed to there is no problem of re-fixing the summons for hearing. It is only when it is not working as it should that calls for the actions suggested by Mr. John Cherryman, Q.C. However, the fact remains that it is through no fault of the plaintiffs or their solicitors that the summons was not re-fixed for hearing but entirely that of the Court registry. Though the suggested measures may bring about result the failure to take them did not mean that the plaintiffs or their solicitors had been at fault because the conduct of the matter is governed by the RHC and there is no infringement of the same and therefore there has been no default. The onus is on the Court registry to put its house into order and fix every single matter filed that is awaiting to be dealt with for hearing without having to be reminded. The instruction to the Court registry is given in the praecipe when payment was made. Any registry which is efficient would have dealt with the matter without any need for any reminder. In my view, in this case, it would be a travesty to blame someone for the fault of the Court registry.

Could the plaintiffs and their solicitors then be faulted for the period of more than 9 years when the plaintiffs and their solicitors did not send any reminders nor do anything to get the summons re-fixed for hearing? It must be remembered that the root of the problem lies in the Court registry in not re-

fixing the summons for hearing but because so many years had gone by without action on the part of the Court registry the plaintiffs and their solicitors, if they were really interested in proceeding with the case would surely have taken measures of, if not by seeing the Deputy Registrar or the Senior Judge, writing to them with details of the delay and the action that is urgently needed. Though the initial fault lies with the Court registry and though a failure to take the measures I have just mentioned is not a breach of the RHC, nevertheless it evinces the disinterest of the plaintiffs and the solicitors in the action. This brings me to the question of whether such disinterest can be a ground for striking out the action.

Whether There is a New Ground - "General Disinterest" - for Striking Out

Mr. Cherryman, Q.C. argued that though the Courts in Malaysia had hitherto followed the traditional approach to striking out, such *Vasudevan v. T Damodran* [1981] 2 MLJ 150 FC, the Court of Appeal and the Federal Court appear, argued learned Counsel, to have accepted as a matter of law that broader principles apply as set out in the following passage in *Hongkong Bank (M) Bhd. v. Raja Letchumi* [1996] 2 MLJ CA, 44:

> In our judgment, the prejudice that will occur when a case required to be tried several years after its institution and the occurrence of the events giving rise to the alleged cause of action. In the present case, there is the added consideration that the bank paid lip service obedience to the order of the Supreme Court.
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> The circumstances of the present case, when taken as a whole, fairly support an inference that the bank is not really interested in the cases it has filed. There is, therefore, no plausible reason for allowing these suit to remain on file.

and also as set out in the following passage in *Public Finance Bhd. v. Natcom Development Sdn. Bhd.* [1996] 2 MLJ 657 FC, 663:

> First, there is absolutely no question of there having been a long delay on the part of the plaintiff in prosecuting the action. Those who invoke the process of the Court must be prepared to act timeously in having their grievances heard. The Courts are no longer prepared to tolerate the long delays with which the law has been associated. These days, trial Courts are anxious to clear the business assigned to them. All others who are concerned in the administration of civil justice should ensure that the Courts are not unnecessarily burdened with litigation which it is not intended to be prosecuted in earnest.

and at p. 664:

> The law in regard to the timeous prosecution of suits has been stated in many cases decided by the precursors of this Court and nothing may be usefully added to the learning contained in them. The effect of those decisions may be

summarised thus. Generally speaking, a plaintiff is liable to have his action struck out if he has failed to obey a peremptory order touching upon the procedural conduct of his case or where he has displayed such a general disinterestedness in the conduct of the litigation as to invite the inference that he has no desire in prosecuting his claim.

Earlier on, Mr. Cherryman, Q.C., had adverted to the sentiment in two English cases to the effect that the traditional approach is too restrictive and called for it to be relaxed. One such case is *Sparrow v. Sovereign Chicken Ltd.* (Unreported, 8 June 1994, CA) where Sir Thomas Bingham MR, p. 241, expressed the hope that "the time may come when the House of Lords will review the existing state of authority and give thought to the question whether on proof of inordinate and inexcusable delay the Court should not have a more general discretion to dismiss an action for want of prosecution if, in all the circumstances, that seems the right course to take" and where Millet LJ, p. 245, said: "...I have long been one of those who consider that the law took a wrong turning when it insisted that inordinate and inexcusable delay was not sufficient, but that there must also be a risk that the fair trial of the action would *[sic]* longer be possible, or that some other prejudice to the defendant should have resulted from the delay. As the law stands, however, that additional requirement must be satisfied before an action can be dismissed for want of prosecution. I wish to echo the sentiments of my Lord, the Master of the Rolls, that this is an aspect of the law which ought to call for reconsideration." The other case referred to is *Kincardine Fisheries Ltd. v. Sunderland Marine Mutual Insurance Co. Ltd.* (Unreported, 21 January 1997, English High Court) where Colman J said: "I venture to suggest that the sooner the whole structure of this jurisdiction is simplified the better. It is difficult to see why there should not be a general jurisdiction to strike out for want of prosecution any claim which for any reason whatever is simply too stale for a fair trial. Since that is the law, I must now embark on the deplorably cumbersome analytical exercise which ever since *Allen v. Sir Alfred Mcalpine & Sons Ltd*. [1968] 2 QB 229 English law has required." It is common ground that in so far as the English law is concerned, there is no such general ground for striking out as "general disinterest" irrespective of prejudice. As for the Malaysian Law, Mr. Cherryman, Q.C., submitted that on the two Malaysian authorities he had just cited, there is such discretion which Mr. Warran. Q.C. disagreed. In my view the law is the same as in England ever since the Federal Court decision of *Vasudevan v. T Damodran* which means that there is no such ground as "general disinterest" irrespective of prejudice. This brings me to *Hongkong Bank (M) Bhd. v. Raja Letchumi* where the term "not really interested" was used which case I have commented very extensively in my unreported case of *Eastern Century Sdn. Bhd. v. Hj. Askil Bin Manung & Anor.* (2 November 1996, High Court, Kota Kinabalu). I wish to add that in view of the Federal Court decision in *Vasudevan v. T Damodran* which is binding

on the Court of Appeal, the law must be that as stated in *Vasuden v. T Damodran* and "general disinterest" irrespective of prejudice is not a ground as confirmed by *Sparrow v. Sovereign Chicken Ltd.* and *Kincardine Fisheries Ltd. v. Sunderland Marine Mutual Insurance Co. Ltd.* If the law is to be changed it would be the Federal Court and thus I respectively am of the view that the Court of Appeal case of *Hongkong Bank (M) Bhd. v. Raja Letchumi* could not and should not be read as changing the law as hitherto been laid done by *Vasudevan v. T Damodran.* This brings me to consider the most recent Federal Court case of *Public Finance Bhd. v. Natcom Development Sdn. Bhd.* (decided after *Hongkong Bank (M) Bhd. v. Raja Letchumi*) to see whether it has changed the law. The facts in that case are these. A writ was taken out on 24 October 1990 for repayment of a loan under a guarantee for which defences were filed and on 24 June 1992, directions for trial were obtained but not complied with. On 26 January 1994 the Court issued a notice under O. 34 r. 8(2) and on 13 February it was explained the steps to prosecute the action were overlooked and the Court acceded to the request for a month to comply which was granted and adjourned the hearing but the order was only complied with until 14 April which was beyond the one month. When the Court sat on 21 April it struck out the action because of the failure to comply "with the undertaking to set down the matter for trial within a month's time" On appeal, the Federal Court set aside the striking out because (1) the long delay before 13 February 1994 was no longer an issue because the Court had on that date granted an extension of time for compliance with the order of the Court (2) the Court had proceeded on the wrong footing that there was a breach of an undertaking when there was no such undertaking and (3) the Court had failed to consider that by 21 April everything was in place for a trial date to be fixed. It was after that conclusion that the Federal Court went on to say:

> The law in regard to the timeous prosecution of suits has been stated in many cases decided by the precursors of this Court and nothing may be usefully added to the learning contained in them. The effect of those decisions may be summarised thus. Generally speaking, a plaintiff is liable to have his action struck out if he has failed to obey a peremptory order touching upon the procedural conduct of his case or where he has displayed such a general disinterestedness in the conduct of the litigation as to invite the inference that he has no desire in prosecuting his claim.

Even assuming that the same test applies when the application to strike out a suit is made under O. 34 r. 8(2) or O. 18, r. 19 or the inherent jurisdiction of the Court, the law or the test, in my view, must be the one as laid down in *Vasudevan v. T Damodran* and "general disinterest" irrespective of prejudice is not a ground. Thus when the Federal Court summed up the law as it did,

I am of the respectful view that the summary - "Generally speaking, a plaintiff is liable to have his action struck out if he has failed to obey a peremptory order touching upon the procedural conduct of his case or where he has displayed such a general disinterestedness in the conduct of the litigation as to invite the inference that he has no desire in prosecuting his claim" - is incorrect because the law, which the Federal Court attempted to summarise, hitherto contains no provision for striking out on the ground of "general disinterest". Could the Federal Court (in *Public Finance Bhd. v. Natcom Development Sdn. Bhd.*) then be taken to have laid down a new general ground of "general disinterest" for striking out? Though speaking for myself I would rather it did as it would definitely lighten my burden, nevertheless I am of the view that it does not because, as I have said, the law has all this while been as laid down in *Vasudevan v. T Damodran* which does not advert to "general disinterest" irrespective of prejudice as a ground and the Federal Court was merely attempting to summarise what had been laid down in *Vasudevan v. T Damodran* (and other Federal Court cases since that decision) and it made, in my respectful opinion, a wrong summary. The Federal Court if it had intended that there is new test of "general disinterest" it should have said so expressly but did not so. Thus, I am in agreement with Mr. Warren, Q.C., that there is no such new ground for striking out as "general disinterest" in a case. Therefore such "general disinterest" must be blameworthy within the test laid down by *Vasudevan v. T Damodran* but, as I have said earlier, the plaintiffs or the solicitors are not to be blamed because they have done all that was required by the RHC and it was entirely the fault of the Court registry in not re-fixing the summons for hearing.

What I have to said thus far, in my view, is sufficient to dismiss the application for striking out the Zara Suit and what I have said applied equally to the Banita Suit which stands in far better position than the Zara Suit. The plaintiffs set the Banita Suit down for trial on 11 October 1983 and then followed it with letters to the Court registry. Though the choice of words of those letters are inept but are nevertheless clear enough to anyone in the Court registry as meaning a request for the Court to fix a date for the hearing of the case. There were five such letters in 1984, none in 1985, three in 1986, five in 1990, one in 1991 and two in 1995. It was then followed by the plaintiffs' solicitors in the Sessions Court as in the Zara Suit. The request resumed in 1996, nine letters in all. Finally the Court registry woke up on 28 September 1996 and the Judge fixed the case for trial on 27 January 1997.

Though what I have said so far is sufficient to dispose of the applications, I would on other considerations as well refuse to strike out the two suits.

Other Factors for Not Striking Out

After the notice of hearing for the Banita Suit was served on the defendants' solicitors, they responded by making an application on 18 October 1996 to have the trial rescheduled to 3 March 1997 which the Court obliged. On 9 January and 15 January 1997, the Court heard arguments as to why the Banita Suit and Zara Suit should not be tried together and the Court on 15 January ruled that they should and also gave directions for the Zara Suit and re-affirmed the trial date of 3 March for both suits. It was only on 30 January that the defendants intimidated that they would be applying to have both suits struck out. Both suits were subsequently, on a without prejudice basis, agreed to be postponed to commence on 23 June.

These two suits were all ready for trial before the defendants gave indication on 30 January that they will be applying to have the two suits struck out. Though this alone is not sufficient to bar the applications, it is a factor to be taken into account (*Roebuck v. Mungovin* [1994] 2 AC 185 and *Negara Properties Sdn. Bhd. v. Akitek Bersekutu Malaysia* [1995] 2 MLJ 185). Mr. Warren Q.C. had argued that an application for striking out under O. 18 r. 19 cannot be made once an action has been set down for trial and relied on *Bank Bumiputra Malaysia v. Lorrain Esme Osman* [1987] 1 CLJ 572 and *Jamir Hassan v. Kang Min* [1992] 2 MLJ 46. I will deal first with *Bumiputra Malaysia Berhad v. Lorrain Esme Osman* where Dr. Zakaria Yatim J (as he then was) spoke of O. 18 r. 19, at p. 575, in these terms:

> The rule does not specify a time limit during which a party may apply to the Court to strike out a pleading. But the application should be made promptly and as a rule before the close of pleadings. The Court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial. See *The Supreme Court Practice*, 1985, v. 1, p. 304.

In *Jamir Hassan v. Kang Min* [1992] 2 MLJ 46, Haidar J, also decided, relying on *Bumiputra Malaysia Berhad v. Lorrain Esme Osman*, that an application to strike out must be refused after the action had been set down for trial. Mr. Cherryman, Q.C., submitted that that both cases are not a good authority because the practice had since the 1985 White Book been stated differently in the 1997 *White Book* at para. 18/19/4, *viz.*: "The application may be made after the pleadings are closed (per *Brett M.R. Tucker v. Collinson* [1886] 34 WR 354, or the trial set down (*Goymer v. Central Wheelbase Ltd.* Times, 1 April 1993, CA) though it should not be heard at the opening of the trial, save in exceptional circumstances (*Halliday v. Shoesmith* [1993] 1 WLR 1 CA..." Learned Counsel argued that the rule contains no limitation as to when an application can be made and the Court should give the rule its plain

and ordinary meaning (*Goymer v. Central Wheelbase Ltd.*, pp. 16, 18-19) and not read into it words limiting when an application can be made. Since the two Malaysian authorities are not binding on me, I would respectfully refuse to follow them and accept the proposition of law that the application can be made at any time, even after the case had been set down for trial for the reasons stated by Mr. Cherryman, Q.C.

I agree with Mr. Cherryman, QC, that the issues in the two suits call for oral evidence for which, on account of the death of some of the witnesses, the defendants will be prejudiced. However, what brought the prejudice in those deceased persons not being able to give evidence in Court is not the result of any blameworthy conduct on the part of the plaintiffs or their solicitors but that of the Court registry and the plaintiffs should not be punished for it. Therefore in view of the fact that the two suits had already been set for trial, the fact that the plaintiffs are not to be blamed for the delay, I am of the opinion, notwithstanding the prejudice the defendants had suffered, that the two suits should not be struck out.

Conclusion

Accordingly, I dismiss the two applications with costs to the plaintiffs.

Reported by Ling Hea Hoon